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Nos. 85-971, 85-972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, Comptroller of the Currency,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the McFadden Act is applicable to offices of a national bank at which no money is lent, no deposits accepted and no checks paid.

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The American Bankers Association respectfully submits this brief as amicus curiae, with the consent of the parties, to urge the Court to reverse that part of a decision by the United States Court of Appeals

for the District of Columbia Circuit which held that discount brokerage offices of national banks are "branches" of the banks and therefore governed by the geographical limitations upon the location of "branches" of banks imposed by the McFadden Act, 12 U.S.C. § 36.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States. Its membership includes banks chartered by the Comptroller of the Currency ("national banks") and banks chartered by the states in which they are located ("state banks"). ABA member banks are located in each of the fifty states and the District of Columbia. The Association frequently appears in litigation, either as a party or as an amicus curiae, in order to represent the interests of the banking industry at large in particularly important cases. The Association has appeared as amicus curiae in this case in the District Court, the Court of Appeals, and on the Petitions for Writ of Certiorari in this Court.

The McFadden Act provides that the term "branch" includes any place of business, other than the main office of the bank, at which deposits are received, checks paid or money lent. 12 U.S.C. § 36(f). Commercial banks perform many services for their customers other than the three enumerated functions. Some of these services are offered to the public in competition with other industries (such as the securities industry, whose representative is the respondent in this case) which are not subject to federal law restrictions upon their ability to do business in any

convenient location selected by them. It is, accordingly, of great importance to the commercial banking industry in terms of its capacity to compete in the marketplace that the McFadden Act not be read any more broadly than its plain language requires.

SUMMARY OF THE ARGUMENT

Historically, the purpose of the McFadden Act was to permit national banks to establish full service branch offices in those states where state-chartered banks were permitted to do so, and then only to the extent that state-chartered banks were permitted to establish branches. The law did not deal with places of business of national banks (already in existence) which were not branches. Unlike full service branches, those places of business were not unlawful before the McFadden Act, and they did not become unlawful by reason of the McFadden Act. The decisions of the courts below thus turn the legislative history on its head by construing a statute designed to authorize additional places for the conduct of a general banking business by national banks as one *prohibiting* places of business whose existence was not even in issue at the time the law was enacted.

ARGUMENT

The McFadden Act became law on February 25, 1927. It provided in relevant part that a national bank could establish branches wherever, within the state in which the bank was situated, a state-chartered bank could, by state statute, establish a branch. 12 U.S.C. § 36(c). The law also defined "branch" to *include* "any branch bank, branch office, branch agency, additional

office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f) (emphasis supplied).

In this case, Union Planters National Bank of Tennessee and Security Pacific National Bank of California sought and received permission from the Comptroller of the Currency to acquire or establish, as operating subsidiaries of the banks, discount brokerage operations. A discount broker is a securities broker which "does not provide investment advice or analysis, but merely executes the purchase and sell orders placed by its customers." *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 104 S. Ct. 3003, 3005 n. 2 (1984). In both cases, it was anticipated that the operations of the discount brokerages would take place in offices other than the main office and authorized branches of the two banks, and that such offices might well be located in states other than Tennessee and California. At such offices, no deposits would be received, no checks paid, and no money lent.

If the McFadden Act had used the word "mean" instead of "include" in the definition quoted above, there is little doubt that the discount brokerage offices of the banks here in issue would fall outside the definition and would not be bound by the law's geographical restraints applicable to branches. But as this Court has held, the use of the word "include" creates a certain "indefiniteness with respect to the outer limits of the term." *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 135 (1969). The three enumerated functions define "the minimum content

of the term 'branch' ". *Id.* The definition "*may* include more." *Id.* (emphasis supplied.)[1]

Given the lack of precision in the language of the statute itself, it is crucial to understand the historical context in which the McFadden Act was passed sixty years ago in order to apply that Act to the present case.

At the time the McFadden Act was debated and passed by Congress, there was a commonly understood and long-standing distinction between bank "branches" and other places of business of banks which were neither the "banking house" nor "branches" of the banks. A 1911 opinion of the Attorney General describes the distinction in considerable detail:

> In a branch bank bills of exchange are negotiated and discounted; moneys received for deposit; exchange, coin and bullion are bought and sold; money is loaned, and *every kind of banking business that is authorized is there transacted*, unless it be the issuing and circulating of bank notes.

29 Op. Atty. Gen. 81, 94 (1911) (emphasis supplied).

According to the Attorney General, banks were not permitted to establish branches at which a general banking business was carried on in the absence of

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[1] In *Plant City*, the Court did not decide that the definition *does* include more, nor did it specify what more might be included within the definition. It was unnecessary for the Court to do so, since the alleged "branch" in that case was found to be engaging in the business of receiving deposits, and therefore fit within the plain meaning of the statute.

express legislative authority. *Id.* at 90. However, there was a "vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." *Id.* at 87. While "branches" were illegal in the absence of specific legislative authority, the establishment of "agencies" was deemed to be within the implied powers of banks. In support of his conclusions, the Attorney General quoted from several learned treatises of the time:

> In Morse on Banks and Banking, section 46, it is said: "Agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange, may be established in other places. In these cases, it is for the convenience of the public that such should be the case. But there is no case which holds that an agency for the exercise of the more important and valuable functions, such as issuing circulating paper or discounting notes, or any agency designed to carry on the general business of banking, would be regarded as legal, for such nominal establishment of agencies might easily result in the practical establishment of a network of branch banks throughout the home State or in other States."
>
> In 1 Morawetz on Corporations, section 387, it is said: "Banking corporations have implied authority to create agencies for special purposes, such as the redemption and purchase of bills of exchange and other securities, wherever this may be advantageous in carrying on their business; but they have no right to establish branch banks in the absence of express authority conferred by charter.

Id. at 88.

> These authorities are conclusive of the proposition that a bank may maintain an agency, the power of which is restricted to dealing in bills of exchange, or possibly to some other particular class of business incident to the banking business.

Id. at 86.

The Attorney General went on to conclude that there was no explicit statutory authority for national banks to establish branches. He believed that, under some circumstances it might be good policy for some national banks to have branches, but that "such a power can be granted only by Congress." *Id.* at 96. A dozen years later, a successor to the Attorney General concurred in this opinion. At that time, the applicable statute, Section 5190 of the Revised Statutes provided that "[t]he usual business of such national banking associations shall be transacted at an office or banking house located in the place specified in its organization certificate." The Attorney General observed that

> section 5190, R.S., relates to the "usual business" which, in my opinion, is to be construed the general banking business usually conducted by national banks. *There is no statutory requirement that all the business of a national bank shall be transacted at the general office or banking house of the association.*

34 Op. Atty. Gen. 1, 3 (1923) (emphasis supplied).

The following year, this Court took up the question of the ability of national banks to establish branches. A national bank opened, in the city of St. Louis, "a

branch bank for doing a general banking business." *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 655 (1924). Missouri had a law providing that "no bank shall maintain in this state a branch bank or receive deposits or pay checks, except in its own banking house." *Id.* The state sought to enforce this prohibition against the bank. The bank argued that, as a federal instrumentality, it was not bound by state law. The Supreme Court disagreed, holding that state law applied to the bank unless that law was in conflict with federal law. In that case, federal law did not supersede state law because nothing in federal law permitted a national bank to establish branches. In support of its conclusion, the Court cited the "well-considered opinion" of the Attorney General rendered in 1911 to which we referred above. *Id.* at 658.

Of particular importance for present purposes, the Court held that

> the state statute, by prohibiting branches, does not frustrate the purpose for which the bank was created, or interfere with the discharge of its duties to the government, or impair its efficiency as a Federal agency. This conclusion would seem to be self-evident; but, if warrant for it be needed, it sufficiently lies in the fact that national banking associations have gone on for more than half a century without branches, and upon the theory of an absence of authority to establish them.

Id. at 659.

Thus, the Court had before it the wealth of examples of bank "agencies"—located at places other than the "banking house," and indeed across state

lines—recited in the 1911 Attorney General's opinion and still concluded that national banks had never had "branches" or the authority to establish branches at any time since the enactment of the National Bank Act in 1864. By necessary implication, therefore, this Court, too, adopted the common distinction between "branches" and non-branch business locations.[2]

The *First National Bank in St. Louis* decision thus firmly established the inability of *national* banks to establish branches. But in 1924, state-chartered banks in a number of states had been granted the authority, by state statute, to have or maintain branches. The direct and immediate result of the Court's decision was to prompt Congress to undertake a review of the branching issue. Congress, as well as the Attorney General and the Supreme Court, recognized and acknowledged the existence of national bank business locations which were not "branches." But Congress ultimately concluded that these limited service facilities were inadequate to allow national banks to meet the competition from state-chartered banks which were permitted to operate full service branches. *See* 66 Cong. Rec. 4,432 (1925) (Statement of Senator Pepper, chief Senate sponsor of the McFadden Act); H.R. Rep. No. 83, 69th Cong., 1st Sess. 6 (1926). Indeed, this Court has subsequently held that a principal purpose of the McFadden Act was to create a condition of "competitive equality" in the matter of branching, between state and national banks. *First National Bank in Plant City v. Dickinson*, 396 U.S.

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[2] Since the First National Bank in that case established what was clearly and admittedly a full-fledged branch office, the Court had no occasion to deal with any questions regarding the propriety of non-branch business locations of national banks.

at 131-134; *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 259-60 (1966). But it is clear that the McFadden Act dealt only with the ability of banks to establish branches. There was no need for Congress to deal with any "competitive equality" issues with respect to the establishment of non-branch business locations, since both state and national banks already possessed the implied power to operate such limited purpose facilities, and the McFadden Act manifestly did not change this result.

What the McFadden Act did do was to amend and broaden the former Section 5190 of the Revised Statutes to provide that the "general business" of a national bank could be conducted not only in the place specified in its organization certificate, as had previously been the law, but also "in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title" (12 U.S.C. § 81).

There remains, then, the question whether an office of a bank at which only the function of buying and selling securities for customers, on their order and for their account, constitutes the "general business" of the bank as that term was understood. If discount brokerage constitutes the "general business" of banking, then Brenner Steed and Associates, Inc. was engaged in the "general business" of banking prior to its acquisition by Union Planters National Bank.

Brenner Steed was a going concern, whose operations were not appreciably affected by its acquisition—only its ownership. However, Brenner Steed could not have been engaged in the "general business" of banking prior to its acquisition, since Tennessee statutes expressly make it unlawful "for any

person not so authorized to carry on a banking business" § 45-2-1701 Tenn. Code Ann. (1980). A person becomes "so authorized" by receiving a certificate of authority from the commissioner of banking. § 45-2-217 Tenn. Code Ann. (1980). Brenner Steed, not being a bank, never had such a certificate of authority.

Perhaps more to the point, however, is the fact that securities affiliates of national banks, which very much resembled the discount brokerage subsidiaries here in issue, existed prior to the passage of the McFadden Act, despite the lack of authority for national banks to establish "branches" in the absence of explicit statutory enactment. Obviously, such securities affiliates were not then deemed to be "branches," but rather were considered to be perfectly legal particular purpose facilities within the implied powers of the banks. After the McFadden Act was passed in 1927, the securities affilates of national banks continued to operate, even in places where it would not have been proper for the banks to have "branches." The securities affiliates continued to exist, unremarked and unchallenged by any bank, any competitor industry, any regulator, any court or any Congressman until the effective date of the Glass-Steagall Act in 1934, when those affiliates disappeared for reasons wholly unrelated to the "branching" limitations imposed by the McFadden Act. It is therefore equally obvious that securities affiliates of national banks were not intended to be treated as "branches" of the banks, nor as engaged in the "general business" of banking by the McFadden Act either. This Court has held that the universal behavior of entities regulated by an Act after its passage, though not conclusive, at least supports the view that the

Act actually means what they understand it to mean. *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 104 S. Ct. 2979, 2992 (1984).

The history of securities affiliates of national banks is set forth in detail in the published records of hearings held in the Senate in 1931. *See Hearings Pursuant to S. Res. 71 before a Subcommittee of the Senate Committee on Banking and Currency*, 71st Cong., 3d Sess. (1931) (hereinafter referred to as "Hearings").

The first securities affiliate of a national bank was established by the First National Bank of New York City in 1908. (Hearings at 1052). The National City Bank, New York, followed suit three years later—the same year the Attorney General opined that national bank "branches" would be illegal, but particular purpose facilities would be proper—and most of the other large banks in New York and elsewhere did likewise over the next ten years. (Hearings at 1054).

The securities affiliates of national banks took a variety of forms, but of particular interest to the present case is the affiliated corporation "a controlling interest in which is held by the bank." (Hearings at 1054). That is precisely the case before this Court now, and that kind of affiliate existed fifty-five years ago—four years after the McFadden Act.

Similarly, the securities affiliates of national banks, as they existed fifty-five years ago, performed a variety of functions, but of particular interest here is the fact that the typical affiliates acted as "[r]etailers of securities, maintaining corps of salesmen and often branches in other States than that in which the bank operates for the distribution of stocks and bonds to

institution and private investors." (Hearings at 1057). Here, of course, the brokerage subsidiaries of the national banks engage in more limited functions—retail brokerage of securities rather than "distribution" of securities as that term is now understood. But in 1931, four years after the McFadden Act, securities afffiliates of banks operated at locations across state lines, those locations being treated as branches of the affiliates, not of the bank itself. If the McFadden Act did not bar those activities in 1931, it should not be construed, in 1986, to bar the out-of-state offices of a discount brokerage subsidiary of a national bank. Congress is presumed to know its own laws, *United States v. Hawkins*, 228 F.2d 517, 519 (9th Cir. 1955), and yet at the time of the 1931 Hearings, there is not the slightest hint, anywhere, that the Congress thought it the least bit odd, from the perspective of the McFadden Act, for national banks to operate securities offices essentially any place the banks chose.

CONCLUSION

The McFadden Act enumerates three functions, the performance of any one of which by an office of a national bank would make that office a "branch." There is no compulsion in the plain language of that statute to read the definition of branch any more broadly than that, nor is there any warrant in the history surrounding the enactment of the statute for doing so. Consequently, an office of a national bank limited in its functions to the retail brokerage of securities, and which does not lend money, pay checks or receive deposits is not a "branch" of the bank

within the meaning of the Act. The contrary decision of the District of Columbia Circuit should be reversed.

Respectfully submitted

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